Central Law Journal.

ST. LOUIS, MO., FEBRUARY 11, 1921

IS A GAIN IN VALUE REALIZED FROM THE SALE OF PROPERTY INCOME?

A recent decision by United States District Judge Thomas of the District of Connecticut in a case known as the Brewster Case, is being discussed in clubs, banking houses and wherever men encumbered with large incomes and plagued with big profits assemble to commiserate each other on the injustice of the income tax. But this decision has given cause for more rejoicing than did the decision of the Supreme Court in the Eisner Case (252 U. S. 206, 40 Sup. Ct. 193), holding stock dividends not to be income. For this decision holds that "profits realized from the sale of property which is part of the capital of one not engaged in trading in such property is not income." Brewster vs. Walsh, 268 Fed. 207.

In this case plaintiff bought certain bonds in 1903 for $231,000 and sold them in 1916 for $276,000. Plaintiff refused to return this profit as income of the year 1916 and the Commissioner of Internal Revenue assessed the income on this transaction at $111,670, taking as the basis of his calculation the value of the bonds on March 1, 1913, at which time, according to market quotations the bonds were worth $164,480. If the market price for these bonds on March 1, 1913, had been higher than in 1916, plaintiff would have had to pay no tax in spite of the actual profit based on the original cost, of $44,850. But since the market value of the bonds on March 1, 1913, was less than the purchase price, the plaintiff was compelled to pay on more than on his actual profit. But plaintiff objected to paying anything on those bonds as *income* since, as he contended, they represented exactly the same capital that he had in 1913 and appreciation of capital under the Eisner decision was not income. He therefore paid the tax under protest and brings this suit to recover the amount so paid. In giving judgment for the plaintiff the court declared that the income tax act so far as it attempts to tax "gains derived from the sale or other disposition of property" is not within the Sixteenth Amendment authorizing a tax on *incomes*, but is a direct tax not apportioned among the states and therefore prohibited under the Constitution." In support of his position Judge Thomas says:

"The meaning of the word 'incomes' in the Sixteenth Amendment is no broader than its meaning in the act of 1867. It was adopted in its present form, using only the words 'incomes from whatever source derived,' with the presumptive knowledge on the part of Congress and the several state legislatures, of the meaning attributed thereto by the decisions of the various courts, both state and federal.

"It has been held repeatedly that gains realized from the sale of capital assets held in trust are not income, but are principal—exactly as the securities were before they were sold, and that where a tenant for life is entitled to the entire net income of a fund, and the trustee realizes an advance in value by the sale of an investment, the life tenant is not entitled to the gain which is uniformly treated by the courts as an increment to principal and a part of the corpus of the trust.

"These decisions had at the time of the adoption of the Sixteenth Amendment established a definite meaning of the word 'income' for the purpose of statutory and constitutional construction. It is difficult to see how the word 'income' can have any different meaning when applied to the proceeds of an investment, when held by a trustee, than when held by an individual, as the Income Tax Law specifically refers to funds held in trust. Section 2 (b).

"The exact question presented in this case has not been before the Supreme Court since its decision in Gray v. Darlington, nor did it arise in Eisner v. Macomber. Notwithstanding certain passages in the opinion of the court in the Macomber Case, stating that, when dividend stock is sold at a profit, the profit is taxable like other income, which I consider, in view of all that has been written by the Supreme Court in a long line of income tax decisions, must

mean that the profit derived from such transactions, if it is income, applies in the case of a trader, and not in the case of an individual, who merely changes his investments.

"Therefore, under the authority of Gray v. Darlington, I feel constrained to hold that the appreciation in value of the plaintiff's bonds, even though realized by sale, is not income taxable as such."

The case of Gray v. Darlington, 15 Wall. 63, referred to by the court in the quotation we have just given, is the nearest case in point on this exact question. This case arose under the Income Tax Law of 1867 and it was there decided that a gradual increase in value extending over a period of years could not be taxed as income for the year in which it was realized by sale. Speaking for the court, Mr. Justice Field, on page 65 of 15 Wall. (21 L. Ed. 45), said:

"The question presented is whether the advance in the value of the bonds, during this period of four years, over their cost, realized by their sale, was subject to taxation as gains, profits, or income of the plaintiff for the year in which the bonds were sold. The answer which should be given to this question does not, in our judgment, admit of any doubt. The advance in the value of property during a series of years can in no just sense, be considered the gains, profits, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property. The statute looks, with some exceptions, for subjects of taxation only to annual gains, profits, and income."

Probably the real point in the Darlington case is that gains to be regarded as income must be annual and not such as those which extend over a period of years. For, in this respect, that case has been definitely approved by the Supreme Court in the opinion in the case of Lynch vs. Turrish, 247 U. S. 221. In that case the court, speaking through Justice McKenna, said:

"Besides, the contention of the government does not reach the principle of Gray v. Darlington, which is that the gradual advance in the value of property during a series of years in no just sense can be ascribed to a particular year, not therefore as 'arising or accruing,' to meet the challenge of the words, in the last one of the years, as the government contends, and taxable as income for that year or when turned into cash. Indeed, the case decides that such advance in value is not income at all, but merely increase of capital and not subject to a tax as income."

The Brewster decision seems to us to follow logically from the decision in the Stock Dividend Case (Eisner vs. Macumber, 252 U. S. 189). For if an increase in the value of one's capital is not taxed when it takes the form of a stock dividend then the subsequent sale of such stock would be a mere conversion of capital assets. If the increase in value of a bond or a tract of real property is not income it is hardly logical to say that the realization of such gain by sale is income.

NOTES OF IMPORTANT DECISIONS.

IS THERE A LIMIT UPON SALARIES PAID BY CORPORATIONS WHICH MAY BE DEDUCTED IN COMPUTING INCOME TAX? —It has not been a secret that many corporations have been diverting their profits to pay huge salaries to officers, directors and stockholders in order to reduce the amount of their income tax assessment. To counteract this practice the Department of Internal Revenue took the position that salaries of corporate officers in excess of a reasonable compensation for services rendered were subject to income taxation as part of the net income or profits of the corporations employing them. This position has been held to be untenable by the U. S. District Court (E. D. Pennsylvania). United States v. Philadelphia Knitting Mills Co., 268 Fed. 270. In support of its decision, the Court said:

"It is clearly the right of the employer to fix and determine what he shall pay, assuming, of course, that the employee is willing to accept of what is thus fixed. He may be unduly, or indeed unwisely, liberal, but an error of judgment of this kind cannot affect his right. We say the position is untenable, not upon the ground that Congress could not limit what should be allowed for deductions by reason of executive salaries, but on the ground that Congress has not thus far, and by the tax acts in question, established any such limitation. Nothing short of the legislative strong hand could

fix any such limitation. There is practically no guide to determine what should be paid or measure of payment other than the judgment of those whose money is being paid. To object to a salary, for illustration, of $25,000 which a corporation might well deem it to be to its interest to pay to one man as its president, because other men might be found willing to accept the position for $5000, or even for $1000, would be recognized at once as an objection without weight."

There can be no doubt that under cover of large salaries the income tax can be easily averted, but who shall say whether a salary paid is too large for the service rendered? Clearly in the first instance the Department of Internal Revenue under its power to make regulations and rules for finding one's income, can define the character of the deductions to be made. It is for the courts to say, of course, whether the regulation is reasonable or whether the rule is applied in a reasonable manner. It is going too far, however, it seems to us, for the courts to say that the Internal Revenue Department has no authority to make any rule whatever with respect to the amounts set apart for salaries. The fact that there may be a deduction for salary necessarily implies that that which is not in fact salary but a distribution of the profits should not be deducted as salary.

THE DOCTRINE OF NUISANCES ATTRACTIVE TO CHILDREN AS APPLIED TO ARTIFICIAL BODIES OF WATER.—The doctrine of the Turntable Cases have given the courts much difficulty. This doctrine is that one who creates an instrument or situation attractive to children must use every means possible to keep children away or protect them from the dangers thereof. The Supreme Court of Iowa, in two recent cases, decided on the same day, had occasion to apply this doctrine to the creation of artificial ponds by railroads on their right of way, such as cofferdams and barrow pits. The Court conceded that such artificial bodies of water were attractive to children but were no more attractive than natural bodies of water and therefore the doctrine did not apply. Massingham v. Railway Co., 179 N. W. 832; Blough v. Railway Co., 179 N. W. 840.

In the Massingham case the Court held that a cofferdam about an abutment of a railroad bridge, inclosed by a substantial barbed wire fence, located wholly on the railroad's right of way and remote from dwellings, was not an attractive nuisance so as to render the railroad liable for death of a boy eight years old, who drowned when he fell from a beam attached to the dam.

In the Blough case the Court held that a pond or barrow pit situated in a railroad's right of way being such as is common wherever railroads have been constructed, without characteristics different than natural collections of water, and without any additional attraction to children or enhancement of danger, the railroad was not liable for death of a five-year-old child, who had wandered from home, from drowning therein, on any theory of attractive nuisance.

The Massingham case differs from the Blough case in the fact that the dam itself in addition to the water inclosed thereby was attractive to children. The Court held that such a structure was not inherently dangerous to children and could not be guarded against a child going upon the dam and falling off into the water. The Court said:

"The sole question in the case before us is whether the structure complained of was of a character and so located as to come within the definition of an attractive nuisance. It was manifestly not inherently dangerous. No machinery of any kind was connected therewith. The only way a child could be injured thereby would be to fall therefrom into the water and be drowned. The structure was not in itself dangerous. It is true that children might be tempted to gratify a spirit of adventure and go upon the dam and do what deceased was doing at the time of the accident, but it is not the law that property owners, having lawful structures thereon, not in their nature dangerous or capable of inflicting injury upon children of tender years, are bound to guard the same against the possibility of someone being injured while upon or about the same."

In the Blough case the Court put its decision that the defendant was not liable on the sole ground that an artificial body of water with no other attraction than the water itself was not any more a nuisance attractive to children than a natural pond or water course.

The rule that artificial ponds of themselves, are not attractive nuisances is held by the great majority of the Courts in this country. Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; Sullivan v. Huidekoper, 27 App. D. C. 154, 5 L. R. A. (N. S.) 263, 7 Ann. Cas. 196; Stendal v. Boyd, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597; Klix v. Nieman, 68 Wis. 271, 32 N. W. 223, 60 Am. Rep. 854; Richards v. Connell, 45 Neb. 467, 63 N. W. 915; Barnhardt v. C., M. & St. P. R. Co., 89 Wash. 304, 154 Pac. 441, L. R. A. 1916D, 443.

There is a line of cases which apparently declare a rule different from that just given of which the case of City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 117, is an example. In this case there was an excavation on a lot in a thickly settled community. Water had collected in this

pit to a depth of 14 feet. It was the fact, however, that a large number of logs had been allowed to remain in the water which induced the boys to make rafts of them which led the Court to hold the owner liable. The Court distinctly says that it was the logs in the water and not the water itself that constituted a nuisance attractive to children.

The decision in the Kansas case of Price v. Water Company, 58 Kans. 551, 50 Pac. 450, 62 Am. St. Rep. 625, is explained in the same way as the decision in the McMahon case, for the nuisance in this case was not the reservoir or settling basin in which the boy was drowned, but a "wooden apron" or buoy which attracted the boy.

An artificial pond of itself is not a nuisance attractive to children any more than a natural water course; nor is the embankment or dam which causes the water to collect. But if there are attractions on or near the water such as rafts, logs, etc., the place may become attractive to children for that reason and should be carefully guarded or the attraction removed.

THE PSYCHOPATHIC LABORATORY OF THE MUNICIPAL COURT OF CHICAGO.*

One of the first psychopathic laboratories in the United States was that in connection with the Juvenile Court of Cook County, established in 1909 on a private foundation furnished by Mrs. William Dummer of Chicago. Dr. William Healy was the Director. After about five years this laboratory was taken over by Cook County and is now maintained by it.

The Psychopathic Laboratory of the Municipal Court was established in 1914. The Juvenile Court of Cook County had about 4,000 cases annually. The Municipal Court Laboratory receives cases from the specialized courts, such as Domestic Relations, Boys', Morals, and the various criminal branches. It, therefore, has cases above the Juvenile Court age, seventeen years, and adults, both men and women. About 10,000 cases annually go through each of the Morals, Domestic Relations, and Boys' Courts; besides a great volume of business through the criminal branches and only selected cases go to the laboratory.

The police officers of the City of Chicago to the number of 5,000 are ex-officio bailiffs of the Municipal Court and hence become agents of the laboratory in bringing in those who do not conform to normal standards and who commit crimes. The Police Department costs the city about $7,000,000.00 per year and the Municipal Court now costs it nearly a million, so that the facts gathered by the Psychopathic Laboratory are incident to an annual outlay of nearly $8,000,000.00 by the City of Chicago. They are expensive facts, therefore, that can nowhere else be gathered together with the same facilities. No medical school has or could afford such a clinic. It would take the Rockefeller Foundation to finance it.

In the third annual report of this court a plan for recording data concerning criminals was outlined as a result of the report of Committee A of the American Institute of Criminal Law and Criminology. By comparing this and the 10th and 11th annual reports of the Municipal Court, which cover three years of the court's history, and records data as to 4,447 cases, excelling in breadth and variety of material any examination of this sort ever made, it will be seen how actual laboratory findings and experiments on actual material have turned out to be widely different from a priori ideas and speculations which were the basis of the earlier reports.

The laboratory draws its material principally from the specialized courts, Domestic Relations, Boys' and Morals Courts. The examination involves intensive individual, criminalistic, psychiatric, psychologic, neurologic, hereditary, anthropometric, and sociologic study. While the heart of the inquiry is subjective study of the individual, it is supplemented with consideration of all that can be revealed by extrin-

*We discussed the Organization and Administration of the Municipal Court of Chicago in last week's issue of the Journal. This article, however, reveals a most interesting development of criminal procedure in this country.

sic facts of environment and heredity. In every case a written report is preserved, signed by the director, available at all future times. These individual records imply full responsibility on the part of the laboratory for every finding noted.

The medical examinations are both clinical and laboratory, according to the needs of the individual case. The mental tests used ordinarily, in addition to the general tests familiar to the science of medicine, are those developed and used in psychiatric clinics at Zurich, Giessen, Berlin, Munich and other European centers. In addition to these we employ the Binet-Simon, Rossolimo Psychological Profile Method; the graduated free and controlled association tests, and the Analysis-Synthesis Series, such as the similarity tests. All the foregoing are evaluated both quantitatively and qualitatively.

There is finally the "world test," which we try to evaluate in all our cases. This is the most crucial of all tests. It consists of the evaluation of the reactions of the cases to their environment, a checking up of their capability of adjustment, their failures and successes at home, in school and at work.

The world test is best appreciated when we follow the reactions of the individual to his environment from earliest childhood. Infancy, childhood and school records should be carefully preserved, and especially Juvenile Court records, which are invaluable, showing, as they do, the fact that the individual has at a tender age come into conflict with his environment to such a degree as to become amenable to the law.

It must be remembered in this connection that environment is, broadly speaking, man-made; it is made by dominants for dominants; it is a social and legal adjustment for normal or well-balanced individuals.

Prior to becoming connected with the Municipal Court, the writer was for ten years on the trial staff of the Prosecuting Attorney of Cook County, and tried many criminal cases, including hundreds of homicide cases. In this work, we had frequently to rely upon expert testimony as to the cause of death and on the subject of insanity. We there learned the importance of calling experts of ability, experience and high standing in their profession. Realizing that when we specialized our business we would have a large number of mental defectives, we consulted Dr. Stuart Paton of Princeton University in regard to securing a man for the place. He surprised me by informing me that the continental clinics, especially those of Kraepelin, Ziehen, and Bleuler were fully twenty years in advance of any clinic in the United States.

Later we consulted Dr. Mott, head of the insane asylum of London, who agreed with Dr. Paton that the continental clinics were far in advance of those in either England or America. In English-speaking countries, the clinical method of approaching mental disease dominates; on the continent the psychological method prevails.

Following this advice we secured for the Municipal Court laboratory an American physician, Dr. William J. Hickson, who was a graduate of the University of Pennsylvania, and had spent two and one-half years in Kraepelin's, Ziehen's, and Bleuler's Clinics and had been for about a year a member of Dr. Bleuler's staff.

Dr. Hickson's first comprehensive report was published about a year ago and covers 4,437 cases. We see in this report of the Municipal Court of Chicago the influence of the European clinics, and it is the most thorough and extensive study of crime ever made in the United States, and perhaps more significant than any ever made in Europe.

The medical profession in the United States has not given much attention to psychopathology, because the medical schools of the United States give no extensive courses on the subject and for the reason, I suppose, that there has been no money in it for the practitioner.

The psychological method of approaching mental disease is important in a great court

psychopathic laboratory, because of the rapidity with which diagnosis can be made. From an hour to an hour and a half is all the director requires to make an exhaustive diagnosis.

Speaking of the diagnoses of dementia praecox, Dr. Hickson said in a paper read before a meeting of alienists:

"From the clinical side in a large percentage of these cases there is nothing very definite on which to establish a diagnosis; while at the same time the disease is of the utmost potentiality in the thinking and doing of the victim; this is sometimes called predementia or latent dementia praecox, which, as a matter of fact, is not latent at all except in the physical sense. The psychological side may be quite well advanced and highly potential criminally, while yet there are practically no definite physical or clinical signs; in fact, as a clinical entity dementia praecox in its present and advanced development can be hardly said to exist in a large proportion of cases.

"Many such physical or clinical signs should not be relied upon to make the diagnosis; and it is well known how well cases of dementia praecox paranoides can dissimulate on occasion. By the psychological method we take the diagnosis to the case in the same manner that we take the tests these days to the feeble-minded, and not sit by and have to wait developments, as is the case in many instances diagnosed by the ordinary clinical methods, and these tests are to the dementia praecox in the reliableness and applicability what the Binet-Simon tests are to the feeble-minded. These psychological signs and symptoms are as clear and definite to the properly trained man as they are unknown or unappreciated to those unfamiliar with the method."

Analysis of Psychopathic Laboratory Report.—It may be of interest to the reader to know what the laboratory report shows as to the prevailing psychoses of those charged with crime.

The Judge sends only suspected cases to the laboratory.

Out of 779 cases in the Boys' Court there were 654 suffering from dementia praecox, or about 84 per cent; 109 psychopathic constitution or about 13 per cent, and 10 epilepsies, or less than 1 per cent.

In the Morals Court, out of 464 cases of females, 260, or 36 per cent, were dementia praecox; 92 psychopathic constitution, or 19 per cent, and 4 epilepsies, or less than 1 per cent.

Out of 359 cases of males in the Morals Court, 107 were dementia praecox, 110 psychopathic constitution and 4 epilepsies.

Out of 657 cases of males in the Domestic Relations Court, 236 were dementia praecox; 295 psychopathic constitution and 3 epilepsies.

In the outside criminal branches of 270 males, 107 were dementia praecox; 68 psychopathic constitution and 5 epilepsies.

Out of 152 females, 84 were dementia praecox, 41 psychopathic constitution and 1 epilepsy.

It will thus be observed that according to Dr. Hickson the criminal psychosis par excellence is dementia praecox combined with feeble-mindedness or, in the language of the layman, injury to the individual in both the intellectual and emotional centers. Psychopathic constitution is a close second. It shows epilepsy playing but a small role, and yet prior to the establishment of our laboratory, some alienists in Illinois believed that epilepsy was playing a high role and a large epileptic colony was established at Dixon, Illinois, but the state had not enough epileptics to supply it, and so a part of that colony is now being diverted to the custody of the feeble-minded and the praecox group. A better understanding of what was really at the bottom of our troubles would have avoided this mistake.

It was my experience as a prosecutor in the Criminal Court of Cook County that medical men generally were not familiar with disorders of the emotional centers, despite the fact that fully 65 per cent of the inmates of the insane asylums are thus afflicted. Dr. Lewellys F. Barker, President of the National Committee for Mental Hygiene, had this to say on this subject:

"One important task will be to bring convictions first to medical men, and later to the general public, that anomalies of feeling

and abnormalities of behavior are as much subject to natural laws as are disorders and defects of the intellectual processes. I have been more than once surprised to find that even neurologists and psychiatrists may sometimes be wanting in this insight; whereas they could readily understand and forgive intellectual defects, they assumed an entirely different attitude toward pathological emotions and the feeble or perverted will. Until our neurologists, psychiatrists and medical men generally come more into agreement concerning the effective life and the conative functions, the origin of motives and explanations of conduct, we can scarcely expect the public at large to bring their ideas of responsibility, of the nature and the purpose of punishment, and of the methods for opposing crime into accord with the conceptions of modern psychiatry."

Dr. Hickson says in his report:

"The positive psychological method of approach has opened up new fields and vistas in the sphere of mental defectiveness. One of these is the differentiation between intelligence defect and affective defect, and their various combinations. Feeble-mindedness, paresis, senile dementia, etc., belong primarily to the first category. The majority of the psychoses, such as dementia praecox, manic-depressive insanity, belong principally to the second category. The intelligence level plays an influential role in all the psychoses, just as they in turn react on the intelligence. It helps materially in the understanding of mental defectiveness to keep these distinctions in mind. Our intelligence level is our mental capital and our affectivity stands for our mental enterprise, credit, etc. Ordinarily they parallel each other, though not necessarily. Where we have combined defect, as where dementia praecox co-exists with intelligence defect, it is called pfropfhebephrenia."

This latter is the most serious defect so far as its relation to crime is concerned. The purely feeble-minded seldom commit crimes, especially where the emotional center has not been affected. Dementia praecox may be regarded as an active instigator in contrast to feeble-mindedness, which might be regarded as a passive instigator of crime. Dr. Hickson has told the whole black story in this remarkable sentence:

"A defective intelligence is a misfortune; a defective affectivity, a calamity; and a defective intelligence and affectivity, a catastrophe."

We can best summarize the principal lessons to be learned from our studies of crime, by quoting from the last annual report of the court, prepared by Dr. Hickson:

1. That delinquency and defectiveness are practically synonymous, the principal forms of defectiveness being dementia praecox, psychopathic constitution and feeble-mindedness, alone or in various combinations, psycopathy being the more active instigator, feeble-mindedness the more passive.

2. That defectiveness is also practically at the bottom of most of our dependency, unemployability, alcoholism, associability, wife desertion, etc.; in fact is synonymous with sociopathology, and is undoubtedly playing an important role in many other mental and physical diseases and accidents.

3. That in the matter of sociopathy, psychopathy (heredity) is an intrinsic factor and environment an accessory factor.

4. At large defectives, socially, economically, industrially, in Army and Navy, are a heavy economic and social burden. In appropriate institutions this burden is to a large degree eliminated.

5. That annually, with statistical punctiliousness, there is a new quota of defectives thrown on the community, that will have to be reckoned with throughout their career.

6. That these cases run true to form, whether it be in school, business or socially.

7. That outlaws, penal institutions and sociological efforts have all handled the problem thus far objectively, completely ignoring the subjective side, the individual himself, with only failure to record. Sociologically, hereafter, just as we have learned in medicine, we will have to "treat the case."

8. That new laws and institutions conforming to scientific advance are demanded.

9. That all courts should have psychopathic laboratories at the service of both sides of a case. Cities should maintain laboratories, where school children and others may be examined and disposition advised. By recognizing defectives early they can be committed to colonies and crime anticipated to the advantage of the individual and his family, as well as society.

10. That universities should provide training along these lines in order that we may have enough properly trained and equipped experts to carry on the work and extend research in these fields. Brain laboratories are badly needed adjuncts. Medical and law students and students of sociology should have adequate instruction along these lines.

The writer's own experience of ten years as a public prosecutor of criminals, and thirteen years as Judge, bears out Dr. Hickson's claim as to the dangerous character of the type where both the intellect and emotional centers are affected. And we would therefore recommend that alienists, judges and social workers be on the lookout for praecox first, and feeble-mindedness second.

This subject is of great importance aside from its criminal aspects. Take for example the question of immigration. Immigration affects our problems of crime and mental deficiency, because European countries have been deliberately dumping undesirables upon us. No sufficiently trained alienists were stationed at our entry ports, and Europe knew it. One woman came to our laboratory a few years ago, who had arrived a short time before from Europe, with twelve feeble-minded children. If these children marry defectives, as is likely, we shall in one generation have 12 x 12, or 144, and if these in turn marry and reproduce, we shall have 144 x 144, and so the swollen stream of bad heredity spreads and inundates our country.

A German magazine writer, after the war, mentioned the trouble they were having because they had not been able to transfer to the United States mental defectives during the war. Our government should make its examination of prospective emigrants on the other side of the Atlantic rather than on this side.

After all, the real significance of this work is not confined by any means to what we started out to consider—the problem of crime. The quick and certain diagnosis of defectiveness in a number of definite classes is an addition to human knowledge and power which transcends such a limited field as criminology.

The persons of stunted intellect and moral defects are scattered all through society. They account for the greatest burden of educators, from the kindergarten to the university. They account for many of the wife desertions, the bizarre and often cruel domestic entanglements, and the divorces. They account for the carelessness, the irresponsibility, and the quarrelsomeness, which checks industrial production. They account for some of the needless civil litigation and for much of the lying of witnesses.

Irresponsibility is the quintessential unsocial characteristic of both general classes of defectives, the morons and the psychopaths. The competent members of the community have to guard these defectives, endure their depredations and make good their waste—often doing all these things without being fully aware of the burden or the cause for it.

Heredity.—Now, what is the great menace from irresponsibility at the present time? Obviously it is the easy reproduction of the unfit. The majority of competent men and women are putting rigid limitation upon the number of the offspring. It is the natural reaction of their sense of responsibility. The defectives have as much instinct for reproduction as normals, some of them much more. They lack the innate inhibitions against easy and rapid reproduction.

And what has society done in the face of this threatening situation? Has it made it difficult or impossible for defectives to propagate? On the contrary, society has devoted itself with frenzied zeal to encourage the propagation of the unfit. It does this in both indirect and direct ways; indirect by placing no bar to the union of the unfit, or the union of unfit with the fit; direct, by exerting itself in every conceivable way that nature and science can suggest to keep alive

every child born to the unfit and to feed and develop every such child until he or she is old enough to reproduce (excepting, of course, the imbecile and the idiot).

Psychopathic surveys of definite districts in New Jersey, New York, Indiana, Minnesota, and other states in recent years have proved the tendency of subnormals to mate with their kind. They multiply more rapidly under the protected environment which modern society so generously provides than normal stocks, which subject themselves to severe limitations. This thing is going on in every state and every city, worse perhaps in some places than in others, but capable of spreading like typhus or plague from place to place.

There have always been defectives and defective stocks, but until quite recently the environment of Northern peoples was so harsh and rigorous that the defective stocks tended constantly to be uprooted, to be bred out. The defectives had much the higher mortality rate, especially among infants. Now we find the ordinary conditions of a century ago, to go no farther back, absolutely reversed. The normals have cut their rate of reproduction and at the same time have actually invited defectives to multiply freely with a guaranty that their offspring will be coddled and nourished and protected and brought by every artificial means to an age when reproductive instincts will provide another generation.

At the present day the defectives are multiplying as never before in the entire history of the race. A great part of the earnest and zealous thought and effort of the community is bent upon enabling this degenerate stream to become wider. The limitation of offspring has foolishly been called race suicide. It is not. Race suicide lies in the encouragement of the unfit.

Of course nature will supply in time a corrective, if we are not clever enough to restore the equilibrium by conscious action. But nature's cure will mean a loss of what we call civilization as the route to the old conditions of privation and rigorous living. When neither normal or defective has any hospital or asylum, but both must shift for themselves in a relentless struggle with natural forces, as was our history through countless ages, the unfit will again diminish and the fit be restored to their rightful ascendency.

It may be that this is the only way. Some of the alternatives are frankly unthinkable. We cannot deliberately reproduce the hardships of life which our forefathers fought and subdued. We cannot withdraw from the unfit the benefit of medical and surgical aid, the lying-in hospitals, the free clinics of a dozen kinds. We cannot avoid protecting them from infectious diseases, from unwholesome food and from the depredations of their own kind and the wiles of the profit-seeking and ruthless normals. For our own protection we have to keep them and their offspring well. We cannot solve the problem by making over all our cities into protected environment so that the defective will have no opportunity to steal, or assault, or corrupt the young. That would be a swift descent to hell, for with a policeman on every corner and no saloon anywhere there would still be just as rapid reproduction as ever.

We cannot do what our ancestors did at a not remote period, put to death every incorrigible criminal. That would help us out to a considerable extent, but it is impossible. We cannot deport our undesirable stocks. We have not been able thus far to keep other countries from unloading on us. We cannot unsex all our defectives. That would be the easiest, the cheapest and the surest method. It would purify the life stream in a few years. But public opinion will not at this time sustain such practices on a scale commensurate with the need.

Imperative Need of Farm Colonies.—There remains seemingly but one alternative, which is to segregate the defective delinquents in state controlled colonies where

the protective environment which they need can be created. Under such control there is an abrupt end to criminal depredations and to reproduction. Both great needs of society are met. The need of the individual defective is likewise met, for he is given an opportunity to live to the limit of his powers, whatever that limit may be in each individual case. He will have all his worries and troubles removed, existence will no longer be anguish and agony for him, but a sensible balancing of work and play.

These farm colonies for defectives are soon to be common enough. They will be in operation long before people generally realize the momentum which real race suicide has gained. They will greatly reduce the cost of the defective to society generally and to the state. For the defective will be able to pay his way when given proper restraints and wise management. And other institutions which are well intended, but have practically failed because defectiveness was not understood will be relieved and permitted to accomplish some good.

Experts Needed.—The greatest limitation today upon immediate entry upon such a program is not the lack of public understanding or the inertia of legislatures, but the inability to produce on short notice the psychopathic experts who are qualified to sort out and classify the subnormals. It will take some time to provide the teaching staffs and to turn out such experts. There will be no lack of public opinion by the time the new type of psychological alienist is provided in sufficient numbers. And by that time the need for stopping the poisoning of the racial stream will be pretty thoroughly understood. Enormous revenues are required for the maintenance of insane asylums. This line of expenditure increases faster than any other, and yet there are more insane at large than in asylums. It lives within the human power, though the complete ideal may never be achieved, to prevent insanity and defectiveness to such a degree that an outspoken case will be as rare as a case of leprosy. We are forced to believe in view of the accepted facts that there must be a turning of the tide before long.

HARRY OLSON.

Chicago, Ill.

BIGAMY—VOID AND VOIDABLE MARRIAGES.

PEOPLE v. DUNBAR.

184 N. Y. Supp. 765.

Supreme Court, Appellate Division, Fourth Department November 24, 1920.

Where defendant, on trial for bigamy, claimed that the first marriage alleged was void because a former wife was living, but testified that the former wife had been absent for more than five years without being heard from, no error was committed in submitting to the jury the question whether the marriage was void or voidable.

HUBBS, J. The defendant was convicted of the crime of bigamy under an indictment which charged that on the 27th day of January, 1920, he married one Geraldine Raleigh in the city of Syracuse, N. Y., while he then had a wife living by the name of Effie May Seeley, whom he had married on the 23d day of August, 1906, at the city of Syracuse, N. Y. Upon the trial the defendant admitted that he was married by the ceremonial marriages as charged in the indictment. He contended, however, at the trial, and now urges, that by the marriage to Geraldine Raleigh on the 27th day of January, 1920, he did not commit the crime of bigamy, for the reason that the alleged marriage to Effie May Seeley on August 23, 1906, was null and void, because at the time of that marriage he had a wife living, whose name was Leonora Healy, to whom he had been duly and legally married on November 26, 1897.

The defendant testified that in 1899, two years after he entered into the first marriage with the Healy woman, she left him, and that he did not know until the winter of 1909 that she was living. That was four years after his second marriage, the marriage to Effie May Seeley. He then procured a decree of divorce from the Healy woman, the one whom he married in 1897, and he continued to live for some time thereafter with Effie May Seeley, the second woman whom he married, treating her as his lawful wife. Therefore we have squarely

presented the question whether or not the marriage which took place between the defendant and Effie May Seeley, in 1906, made Effie May Seeley his wife, within the meaning of section 340 of the Penal Law (Consol. Laws, c. 40), so that his subsequent marriage on January 27, 1920, to Geraldine Raleigh, made him guilty of the crime of bigamy.

Section 340 of the Penal Law reads as follows:

"A person who, having a husband or wife living, marries another person, is guilty of bigamy and is punishable by imprisonment in a penitentiary or state prison for not more than five years."

The defendant contends that his second marriage was void because, at the time it was contracted, his first wife was living and hence that no charge of bigamy for a third marriage may be founded upon the second. Many cases are cited by the appellant, stating the general rule substantially as set forth by Presiding Justice McLennan in the case of People v. Corbett, 49 App. Div. 514, 63 N. Y. Supp. 460, where he wrote:

"Cases might be cited, decided by the highest court in almost every state of the Union, which hold that, where a marriage is solemnized between the parties who are prohibited from entering into that relation by statute, such marriage is absolutely void, and that, if such void marriage is followed by another and subsequent marriage, the void marriage cannot be made the basis of a conviction for bigamy."

That the foregoing is a correct statement of the general rule cannot be questioned and it is undoubtedly true that at common law said second marriage would have been absolutely null and void. At common law the remarriage of one having a husband or wife actually living, though unheard of for years and believed to be dead, was void ab initio. Price v. Price, 124 N. Y. 589, 596, 27 N. E. 383, 12 L. R. A. 359. At the time the defendant entered into the marriage ceremony with Effie May Seeley it was provided by section 3 of article 1 of chapter 48 of the General Laws, being chapter 272 of the Laws of 1896, as follows:

"*Void Marriages.*—A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless, either: * * *

"3. Such former husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time."

It is further provided by section 4 of the same act, as follows:

"*Voidable Marriages.* — A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto: * * *

"5. Has a husband or wife by a former marriage living, and such former husband or wife has absented himself or herself for five successive years then last past without being known to such party to be living during that time."

It is urged by the people, under those provisions of the statute, that the marriage between the defendant and Effie May Seeley was not void, and that the defendant, when he married Geraldine Raleigh, had a wife living, to-wit, the said Effie May Seeley.

While the exact question here presented does not seem to have been passed upon by the courts, it has been held in many cases that, where a person enters into a second marriage while having a husband or wife by a prior marriage still living, who has absented himself or herself for five successive years without being known to the party contracting the second marriage to be living during that time, such second marriage is not void, and it has been held valid for many purposes, although it has developed after such second marriage that the first husband or wife was still living. In the case of Stokes v. Stokes, 198 N. Y. 301, at page 305, 91 N. E. 793, at page 794, Judge Vann wrote:

"If she did not then know it within the true meaning of the statute and she married the second time in the full belief, after due observance of the five-year provision, that her first husband was dead, the marriage was not void but voidable, binding upon both parties thereto until action by the court, and their relation was that of honorable marriage, with no stain on the good name of either and no blight on the status of any child they might have."

In Matter of Kutter, 79 Misc. Rep. 74, 139 N. Y. Supp. 693, Surrogate Fowler said:

"Such a second marriage subsists until death or an adjudication avoiding it, and this is so, even if it transpires that the disappearing spouse of the prior marriage reappear."

The validity of such second marriage cannot be attacked collaterally. Frank v. Carter, 219 N. Y. 35, at page 38, 113 N. E. 549, L. R. A. 1917B, 1288.

In the case of Price v. Price, 124 N. Y. 589, at page 599, 27 N. E. 383, at page 385, 12 L. R. A. 359, the Court said:

"The changes effected by the Revised Statutes in the rights of parties entering in good faith into a marriage while one has a living and undivorced spouse who has been absent for five years and not known to be living, are: (1) The marriage is not void from the beginning, but voidable. (2) When judicially annulled, it is only void from the date of the judgment. (3) When so annulled, the issue may be adjudged entitled to succeed to the estate of the parent

who was competent to marry, in the same manner as legitimate children. (4) It has been held that while such a marriage remains unannulled, the cohabitation of the parties is not adulterous (Valleau v. Valleau, 6 Paige, 207); also that the survivor is entitled to administration (White v. Lowe, 1 Red. 376); and before the passage of the acts for the protection of married women, that the husband could hold and transfer the personal property of the wife (Cropsey v. McKinney, 30 Barb. 47)."

Certainly, under the decisions heretofore referred to, the marriage between the defendant and Effie May Seeley was valid for the purposes referred to in those cases. If it was valid for those purposes, we are unable to see why, within the meaning of section 340 of the Penal Law, the defendant did not have a wife living, to-wit, said Effie May Seeley, at the time when he married Geraldine Raleigh. The law in regard to voidable marriages is stated in 7 Corpus Juris, under the title of Bigamy, at page 1159, section 8, as follows:

"A voidable marriage will support an indictment for bigamy, inasmuch as it is binding, in general, on the parties thereto until it is set aside under a direct proceeding instituted for that purpose. A prior marriage, voidable for the want of legal age of either, or of both of the contracting parties, will sustain a conviction for bigamy, unless such marriage has been judicially annulled because contracted under the statutory age of consent, unless there was a separation with the consent of the minor before attaining majority, or unless the marriage was not confirmed by cohabitation after arriving at the age of consent."

Many cases are cited, from different jurisdictions, which sustain this statement.

The learned county judge, in submitting the case to the jury, correctly stated the law upon the question of void and voidable marriages, and left it to the jury to determine on the evidence whether the marriage between the defendant and Effie May Seeley was void or voidable. We can find no error in that respect, and the finding of the jury was abundantly sustained by the evidence in the case. In fact, there is practically no dispute upon that question.

The counsel for the defendant has argued other questions which he insists constitute reversible error. In view of the conclusion which this court has reached upon the principal defense offered by the defendant, those questions cease to be matters of importance. As the main defense was that the second marriage was void, and as this court has reached the conclusion that the jury was justified in finding it to be valid upon the defendant's own evidence, at least for the purpose of establishing the defendant's guilt under the facts in this case, it is unnecessary to discuss those alleged errors.

The judgment of conviction should be affirmed. All concur.

NOTE—*Void and Voidable Marriages in Prosecutions for Bigamy.*—It has been said that marriages forbidden by canonical impediments are voidable only and those overstepping civil impediments are void, in common law view. Bishop Marr. Div. & Sep. § 265 et seq. And a marriage that is void is not good for legal purposes and may be attacked at any time either directly or collaterally, while a voidable marriage is one in which there is an imperfection, which can only be considered on direct attack and within the lifetime of both parties thereto. Id. § 158. This distinction is said to be one of substance and not a mere refinement. Thus it has been held that an incestuous marriage, unless expressly interdicted by statute, is good for all civil purposes, until annulled on direct proceeding. 2 Kent's Com. 95; Story Confl. Laws § 114; Bowers v. Bowers, 10 Rich. Eq. (S. C.) 551, 73 Am. Dec. 99; Sutton v. Warren, 10 Met. (Mass.) 451. But if a statute expressly interdicts and punishes those contracting same, it is void. Fearnow v. Jones, 34 Okla. 694, 126 Pac. 1015, L. R. A. 1916C, 720. But though a marriage may be inhibited by law, yet if it is capable of being ratified by subsequent cohabitation and conduct, it is a valid marriage until dissolved by judicial decree. State v. Yoder, 113 Minn. 503, 130 N. W. 10, L. R. A. 1916C, 686. Therefore, where in this last cited case there was a demurrer, which was sustained to an indictment for bigamy, upon a recital of facts stipulated by the parties, to the effect that a statute merely prohibited remarriage by either party within three months, and defendant had remarried within said time, he could not be convicted. The Supreme Court sustained such holding. It was said "defendant's second marriage was valid until set aside by a competent Court."

In Bostwick v. State, 1 Ala. App. 255, 55 So. 260, it was held in an abandonment proceeding that it was no defense to show a marriage was obtained by duress, where no annulment had been decreed. The logic of this ruling is that it would be a defense in a prosecution for bigamy.

It has been held also, that where a marriage by one of the parties to a divorce proceeding within a certain time after divorce is by the statute expressly declared to be void, whether contracted within or without the State, this will be a defense in a prosecution for bigamy, where contracted in a foreign country whose laws recognize its validity. State v. Fenn, 47 Wash. 651, 92 Pac. 417, 17 L. R. A. (N. S.) 800. The Court said that: "A statute declaring marriages void, regardless of where contracted and regardless of the domicile of the parties, would be an anomaly, and so far-reaching in its consequences that a court would feel constrained to limit its operation, if any other construction were possible."

Most of the cases in the books concern status for other purposes than the status of a bigamist, but relate to the status of property and the legitimacy of children, and the general conclusion is that where it is required there must be annul-

ment to fix status or cohabitation or ratification, the former marriage is merely voidable and not void.

C.

ITEMS OF PROFESSIONAL INTEREST.

1921 MEETING OF THE AMERICAN BAR ASSOCIATION.

The Executive Committee of the American Bar Association met at New Orleans January 5-8, 1921, and selected Cincinnati as the place of holding the next meeting of the American Bar Association. The date of the meeting will be August 31 and September 1 and 2, 1921.

The tentative program includes addresses by the following: Hon. John W. Davis, American Ambassador to England; Hon. Charles S. Thomas, United States Senator from Colorado; William A. Blount, Pensacola, Fla., President of the Association.

IF CORPULENCE WERE DECLARED A CRIME.

The man or woman who carries extra flesh is as much an addict as is the individual enslaved to his drug. These slaves to food excesses will not rise up and cure themselves. Sooner or later the community will have to take them in hand and bring them back to normal.

This can be done at any time by declaring corpulence a crime and by assessing the appropriate punishment—incarceration without food.

There are many reasons why corpulence should be declared a crime and punished. The first and obvious reason is that the fat person is consuming more than his share of the food of the community. The second reason is that he occupies more than his allotted space in the public places—that he slows up the flow of normal life for which he is too deliberate. He is a criminal in the third place because he is committing suicide, which is against the law.

When corpulence is declared a crime in the eyes of the law, the perfect crime will have been discovered.

Conceive the satisfaction in preparing the evidence against such a criminal. When he is presented he mutely testifies against himself. His very appearance is a plea of guilty. The evidence may be weighed on a grocer's scale. There will be no wrangling lawyers, no third degree, no cross-examination. The accused steps on the steelyards and rings up his sentence. It is the perfect crime. The punishment is no less perfect.

Experiments have shown that a fat man without food loses weight at the rate of two pounds a day. Therefore, when the scales indicate an overweight of twenty pounds the sentence is automatically ten days.

"To be released at 150 pounds," the judge might say.

The problem of incarceration would be very simple. The only supplies required for a month's stay in the calaboose would be a jug of water.

Personally, I am already convinced that corpulence is the greatest curse of the age. It threatens the well-being of the race. It is unpleasant to the eye. It offends the artistic sensibilities. The possessors of most of it hate it worst. It smothers love, ambition, life itself. It is the modern plague.—W. Atherton Du Puy in *Hearst's*.

PROPOSED AMENDMENT GIVING THE SUPREME COURT OF TEXAS POWER TO MAKE RULES OF PROCEDURE.

The Texas legislature is considering a constitutional amendment by John Davis of Dallas, giving the Supreme Court power to promulgate its own rules of procedure and also power to direct District and Appellate Judges to perform any duty the court thinks proper. The amendment was drafted by a committee of nine from the Texas bar association, including as members of the committee F. M. Etheridge and R. E. L. Knight of Dallas.

There was a recent meeting of the House Judiciary Committee of the Texas Legislature before which appeared leading members of the Texas Bar Association pleading for the bill giving the Supreme Court complete power over the subject of pleading and procedure and for a bill providing for a unified court which would give the Supreme Court control of the entire judicial machinery of the state. Those present at this hearing were: Claude Pollard of Houston, president of the Texas Bar Association; Judge E. B. Perkins of Dallas, Judge C. H. Jenkins of the Court of Civil Appeals at Austin, Judge Buck Searcy of Brenham and N. A. Stedman of Austin.

BOOK REVIEWS.

FOULKE'S INTERNATIONAL LAW.

This great work by Roland R. Foulke of the Philadelphia Bar is a distinct contribution to the science of the law. Its particular value which distinguishes it from other works on the subject consists in its careful analysis and thorough and logical classification.

Preliminary to the treatment of the subject of international law proper, the author has an interesting discussion on the definition and nature of law, in which the author treats of law as the reaction of society to external factors of life other than forces of nature. The purpose of this discussion is to arrive at clear conceptions of abstract principles of legal justice which the writer subsequently intends to use in discussing the principles of international law.

There are three parts. Part I is Preliminary, dealing with definitions and abstract principles. Part II treats of substantive International Law and Part III of Remedial International Law. Part II is subdivided as follows: Intercourse Between Independent States; The Territory of an Independent State; The Open Sea and Branches Thereof; Treaties; Independent States and Aliens; State Contracts. Part III is divided as follows: Redress for Damage to a State Interest; War; Neutrality; Conduct of Hostilities; Property in War; Public Property in War; Private Property on Land and in Maritime Belt in time of War; Private Property on the High Sea in War; Private Individual in War; Character of Individuals and Property.

The treatment of these subjects is clear and is emphasized and illustrated by abundant citations, illustrative cases and quotations from other authors. The work is not a popular treatise but a philosophic, scientific presentation of the subject with such clearness in expression and arrangement that the ordinary lawyer would not have much difficulty in getting a clear grasp of this very important subject.

Printed in two volumes of 482 and 518 pages respectively and bound in cloth.

BOOKS RECEIVED.

Digest of the Decisions of the Courts of Missouri, reported in Vols. 238, 239-267 (in part), Mo. Sup. and parts of unpublished volumes; Volumes 160-162 (in part), 163-193 (in part), Mo. App. and parts of unpublished volumes; Volumes 142-183 Southwestern Reporter. To April, 1916. Supplementing Missouri Digest Volumes 1 to 15. Volume 16, Abandonment—Judges. 1917. Also Volume 17, Judgment—Y. M. C. A.

HUMOR OF THE LAW.

"Did you lose your voice while you were making speeches?"

"No," replied Senator Sorghum. "I applied my new system of speech-making. First, I let the chairman of the Reception Committee take all the time he wanted to introduce me. Then after every two or three sentences I'd mention the name of Our Candidate and let the audience consume most of the time in cheering."—*Washington Star.*

Mirandy, of dusky hue, made a poor witness. In answer to every question put to her by the attorney she invariably replied, "I think so." The attorney finally became disgusted.

"Now, look here," he warned. "I want you to cut out that thinking and answer questions. Now talk!"

"Yes, sah," quavered Mirandy. "But, mistah, you see, it's like dis: Ah ain't like you lawyers; ah can't talk without thinkin'."—*Philadelphia Ledger.*

"Biddy," remarked the newlywed Irishman, "go down and feed the pigs."

"Faith, and I will not," replied the bride.

"Don't be after contradicting me, Biddy," retorted the husband. "Haven't I just endowed you with all my wordly goods, and if you cannot feed your own property, then it's ashamed of you I am."

This was a new point of view, so off Biddy went.

Presently she returned.

"Have you fed the pigs, Biddy?" demanded her husband sternly.

"Faith, and I have not," she answered. "I have done a great deal better. As they were my own property, I have sold them, so they'll trouble me no more."—*London Telegraph.*

A Boston lawyer and his wife were taking their young hopeful through the zoo, when he stopped before the elephant and exclaimed: "Oh, look, father, he's bigger than all hell, ain't he?"

The mother gasped and said: "Willie, how many times must I tell you not to say 'ain't'?"

Lo—"Banks made a bad mistake when he started kissing all the babies."

Le—"Should say so. His opponent, Miss Swell-looker, took the hint and started in on the fathers."—*Yonkers Statesman.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Account Stated**—Bill of Items.—The bare naming of amount due, if accepted, may constitute an account stated; it being unnecessary to render a bill of items.—Locke v. Woodman, Mo., 225 S. W. 353.

2. **Actions**—Tort and Contract.—A tort is a legal wrong committed upon the person or property of another independently of contract. Such a wrong may, however, arise from a violation of some private obligation by which damages accrue to the individual; and if the breach complained of is not mere neglect of a duty expressly provided for by the terms of the contract itself, the complaining party may elect as to his remedy, and rely either upon his right under the contract or proceed for damages as for a tort.—Early v. State, Ga., 104 S. E. 921.

3. **Assault and Battery**—Civil Liability.—Defendant may be civilly liable for cutting plaintiff, though intending not to cut her, but another; his act being unlawful and the result the direct, natural, and probable consequence thereof.—Bannister v. Mitchell, Va., 104 S. E. 804.

4. **Assignments**—Equity.—An order by a school building contractor, addressed to the board of education of the school district, and directing that the district pay moneys by estimates as they became due to the contractor to a bank advancing moneys to him, will be deemed in equity an equitable assignment to the bank of all the rights of the contractor.—City Nat. Bank of Mason City v. Independent School Dist., Iowa, 179 N. W. 947.

5. **Attorney and Client**—Futile Defense.—The omission to set up a futile defense and to attempt to prove it involves no lack of reasonable diligence on the attorney's part.—Utterback-Gleason Co. v. Standard Accident Ins. Co. of Detroit, Mich., N. Y., 184 N. Y. Sup. 862.

6. **Bills and Notes**—Conditional Delivery.—The evidence showing that the note was delivered conditionally and for a special purpose, and the conditions and special purpose having been accomplished, and the note being of no further effect nor validity, the plaintiff was not entitled to recover on the same, and the judgment of the trial court in his favor is reversed.—First Nat. Bank of Crary v. Miller, N. D., 179 N. W. 997.

7. **Brokers**—Agency.—A stockbroker employed by a customer cannot, without the knowledge and consent of the customer, fill the order with stock owned by himself.—In re B. Solomon & Co., U. S. C. C. A., 268 Fed. 108.

8.——Defective Title.—In absence of a contrary stipulation between the parties, a broker who has procured a purchaser ready and able to take the property on the principal's terms does not lose his commission through a defect in principal's title, which is first disclosed to the broker at a meeting of the parties to close the transaction.—Morrow v. Gledhill, R. I., 111 Atl. 712.

9. **Carriers of Passengers**—Free Service.—The fact that it is not a crime for a railroad to agree to carry poor persons and their property without charge does not authorize the carrier to make a contract to render free services to a corporation which was not a pauper and was not engaged in charitable enterprise.—Boston & M. R. R. v. Great Falls Mfg. Co., N. H., 111 Atl. 691.

10.——Intoxication.—If the voluntary intoxication of a passenger on a street railroad's car was the direct and proximate cause of his fall from its vestibule, his rights as a passenger terminated, and, while lying unconscious on the track, he had only the rights of a traveler on the public ways.—Bilodeau v. Fitchburg & L. St. Ry. Co., Mass., 128 N. E. 872.

11. ——Res Ipsa Loquitur.—Where a passenger is injured while in a carrier's vehicle, though the injury is the result of a sudden start of car, the doctrine of res ipsa loquitur is applicable, and the carrier has the burden of showing that the injury was the result of some unavoidable casualty, etc.—Murray v. United Railroads of San Francisco, Cal., 193 Pac. 596.

12. **Charities**—Equity.—Where the form of trust property is legally changed, the trust follows it in its new form with equity's supervisory power of administration unchanged.—Matteson v. Creighton University, Neb., 179 N. W. 1009.

13. **Commerce**—Safety Appliance.—An interstate carrier's shopman, crushed between cars which he was chaining together, because of the absence of a drawhead, when a switch engine, coming onto the siding suddenly pushed the cars together, held to come within the Safety Appliance Act of Congress as a matter of law.—Wight v. Callicut, Tex., 225 S. W. 389.

14. **Constitutional Law**—Dower.—A state statute, limiting the right of dower in case of non-residents to lands of which the husband died seized, held not invalid, as abridging the privileges or immunities of citizens, within the meaning of Const. U. S. Amend. 14.—Ferry v. Spokane, P. & S. Ry. Co., U. S. C. C. A., 268 Fed. 117.

15. **Contracts** — Practical Construction. — To constitute a binding construction by the parties of a written contract, it ought to appear with reasonable certainty that the acts of both parties were done with knowledge, and in view of a purpose at least consistent with that to which they are sought to be applied.—P. Pastene & Co. v. Greco Canning Co., U. S. D. C., 268 Fed. 168.

16.——Public Policy.—The rule that, where a contract is illegal or against public policy, equity will not, at the suit of a party who participated in the illegal or immoral intent, either compel execution of the agreement or set it aside after execution, because such relief would injure and counteract public morals, is not applied in the interest of a party, but of the public.—Mitchell v. Clem, Ill., 128 N. E. 815.

17.——Unconscionable Bargain.—Equity is zealous to relieve an embarrassed debtor from the power of his creditor to drive a hard and unconscionable bargain within the moment of his helplessness, but if, under all circumstances, the transaction was a fair one, free from oppression or taint of fraud such contract will receive the same recognition as any other.—McMahon v. Gotch, Iowa, 179 N. W. 929.

18. **Corporations** — Directors.—One director cannot bind a corporation, as a general rule.—McIlrath v. S. Waterbury & Sons Co., N. Y., 184 N. Y. Sup. 887.

19.——Insolvency.—A receiver will not be appointed for a corporation at the suit of a creditor, unless it appears that it is insolvent or is in imminent danger of insolvency, or creditor's remedies at law are inadequate or would be ineffectual, or appointment is necessary to preserve property or secure justice.—Portage Brick Co. v. North Indiana Brick Co., Ind., 128 N. E. 847.

20. **Criminal Law**—Sentence.—Where accused after conviction is released on his own recognizance, and the prosecution is otherwise abandoned, the trial court is deprived of jurisdiction to pronounce sentence.—People v. Pilewski, Ill., 128 N. E. 801.

21.——Similar Offenses.—In a prosecution for embezzlement, evidence of other transactions of a similar nature is admissible to prove intent and guilty knowledge.—Miller v. State, Tex., 225 S. W. 379.

22. **Deeds**—Failure of Consideration.—A deed given by a father to his daughter, in consideration that she support him during his life, cannot be set aside for failure of consideration, where the grantor admitted that the daughter properly supported him until he left her home, because she was claiming to own the land, whereas he claimed to have given her only a contract for possession during his life.—Bowles' Adm'r v. Harvey, Ky., 225 S. W. 367.

23.——Merger.—While there is a distinction as to merger of contract in later deed as to whether the deed is "in performance of" the contract or merely "pursuant to" the contract, such distinction has no application where the terms of the contract and deed are inconsistent.—Woodson v. Smith, Va., 104 S. E. 794.

24.——Subsequent Conveyance.—Where no legal title passed by a deed, there being no grantee capable of holding real property, a subsequent conveyance by the grantor to an individual passed legal title.—Schein v. Erasmus Realty Co., Inc., N. Y., 184 N. Y. Sup. 840.

25. **Descent and Distribution**—Merger.—In determining questions as to the descent of realty, regard is had only to legal title, and where such title is acquired by purchase, and an equity by gift or inheritance, the legal title and equity at once unite, and at death of the owner the descent of the property will be cast as an estate which came by purchase.—Earl v. Earl, Ark., 225 S. W. 289.

26. **Divorce**—Collateral Purpose.—If one institutes a suit for divorce, not from a desire for the redress sought, but to attain some collateral end, the law characterizes his conduct as insincerity, and withholds the decree prayed, however much the defendant may be in the wrong.—Kirschbaum v. Kirschbaum, N. J., 111 Atl. 697.

27. **Easements** — Special Right. — Generally, where a particular or special right or easement in land is conveyed, which may well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor, the fee does not pass, because it is not essential to the right or interest which is described in the deed.—Village of Winnetka v. Alles, Ill., 128 N. E. 807.

28.——Unlawful Use.—The unlawful use of an easement may be enjoined.—Robertson v. Bertha Mineral Co., Va., 104 S. E. 832.

29. **Ejectment** — Equitable Title. — Plaintiff who received only an equitable title from her predecessor cannot maintain action of ejectment.—Rose v. Agee, Va., 104 S. E. 827.

30. **Electricity**—Negligence.—If an electric power company's guy wire was so situated with reference to a roadway and so near as to be adjoining it, and if its situation with reference to the known general uses of the roadway was such that the company might have foreseen by the exercise of reasonable care that some injury would probably result to persons traveling the roadway if the wire was not shielded, the company was guilty of negligence toward a horseman injured thereby.—Athens Electric Light & Power Co. v. Tanner, Tex., 225 S. W. 421.

31. **Eminent Domain**—Damages.—A judgment in a proceeding to condemn land will not be reversed simply because the reviewing court thinks the amount of damages allowed was excessive, unless such amount is so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality or corruption on the part of the jury.—United States v. Goodloe, Ala., 86 So. 546.

32. **Escrow** — Mutuality. — An agreement whereby lessors delivered oil and gas lease to bank under agreement that lessees have specified time in which to examine the title held not a mere option lacking mutuality, but an escrow agreement with an irrevocable delivery, not void for lack of consideration; the reciprocal rights and obligations of the parties furnishing a sufficient consideration.—Pearson v. Kirkpatrick, Tex., 225 S. W. 407.

33. **Evidence**—Physical Facts.—Where evidence essential to a recovery by plaintiff is clearly disproven by physical facts and conditions, a verdict in his favor should be reversed.—Oliver v. Union Pac. R. Co., Neb., 179 N. W. 1017.

34.——Receipt.—A receipt, evidencing the payment of money upon a contract as between the parties thereto is always open to explanation.—Otis Elevator Co. v. Stafford, N. J., 111 Atl. 695.

35.——Witness.—Even if a party to a suit in equity, who calls an adverse party as his witness, is bound by the testimony of such witness to the same extent as by the testimony of another witness, he is not bound by every statement or conclusion of the witness, so that statements that the conveyances were made for a valuable consideration are not binding, where the facts testified to showed the contrary.—Osley v. Adams, U. S. C. C. A., 268 Fed. 114.

36. **Forgery**—Variance.—In a prosecution for passing a forged instrument, there was a fatal variance between an indictment charging the passing of a draft dated January 18 and evidence showing the passing of a check dated January 20.—Pyor v. State, Tex., 225 S. W. 374.

37. **Homestead**—Alimony.—Where in a divorce, alimony in money is decreed, which is adjudged to be a lien upon all the real estate owned by the defendant in the state, the homestead of the defendant, ownd at the time such judgment is rendered, may be legally levied upon and sold for the payment of the said alimony.—Haven v. Trammell, Okla., 193 Pac. 631.

38. **Homicide**—Uncommunicated Threat—Evidence of previous uncommunicated threats is admissible in cases where it is doubtful who began

the difficulty, as tending to solve the doubt.—Mott v. State, Miss., 86 So. 514.

39. **Injunction**—Actionable Wrong.—One who induces a party to a contract to break it, intending thereby to injure another person or to get a benefit for himself, commits an actionable wrong, unless there is sufficient justification for the interference, and if such interference would result in irreparable injury, equity has jurisdiction to enjoin it, provided the contract is lawful.—Westinghouse Electric & Mfg. Co. v. Diamond State Fibre Co., U. S. D. C., 268 Fed. 121.

40. **Innkeepers**—Negligence Per Se.—Maintenance by a hotel of a fire escape with an opening in the platform in violation of a city ordinance was negligence per se.—Marr v. Whistler, Cal., 193 Pac. 600.

41. **Insurance**—Ambiguity.—Ambiguities in a sickness and accident policy must operate in favor of the policy holder.—Breen v. Great Western Acc. Ins. Co., Iowa, 179 N. W. 931.

42.——Negligence.—Recovery on an accident policy is not defeated by the fact that negligence of insured entered into his death.—Aetna Life Ins. Co. v. Little, Ark., 225 S. W. 298.

43.——Waiver.—Where an industrial life policy provided that agents of the insurer had no authority to make any modifications or waiver of the policy or its provisions, evidence that a collecting agent told the beneficiary that the policy did not lapse until 13 weeks' payments were overdue was insufficient to modify the policy to such effect, or to constitute a waiver of its provisions.—Hayes v. Metropolitan Life Ins. Co., Mass., 128 N. E. 781.

44. **Intoxicating Liquors**—Forfeiture.—The unlawful use of an automobile to convey intoxicating liquors by one lawfully in possession of such conveyance does not forfeit the right of the owner to claim and retain such property, when it appears that such conveyance was so unlawfully used without the consent, fault, or knowledge of its owner.—Peavler v. State, Okla., 193 Pac. 623.

45. **Jury**—Habeas Corpus.—Trial by jury in habeas corpus has never been allowed in the commonwealth of Massachusetts.—Ex parte Graves, Mass., 128 N. E. 869.

46. **Limitation of Actions**—Commencement of Limitation.—Where services are rendered on the promise of compensation in the form of a legacy, the time of payment of compensation is postponed until the death of the promisor, and the cause of action does not arise in favor of the party rendering the services until such death.—In re Leu's Estate, Wis., 179 N. W. 796.

47. **Logs and Logging**—Condition Subsequent.—A condition subsequent, as in a timber deed, is strictly construed, as the law always leans against forfeiture.—Hinton v. Vinson, N. C., 104 S. E. 897.

48.——Irreparable Injury.—Owner's right to injunctive relief against a holdover tenant or contractee in violation of terms of the contract under which possession and timber rights were held and claimed was not dependent on the theory of irreparable injury to the land, it being sufficient that a possessory contract had been and was being violated to the injury of the owner.—O'Rear v. Aaron, Ala., 86 So. 535.

49. **Malicious Prosecution**—Probable Cause.—Actual knowledge, or apparently reliable information believed to be true after due investigation of the facts, from which a reasonable and prudent person might form an honest belief that the accused person was guilty of the crime charged, amounts to probable cause within the law of malicious prosecution.—Miller v. Willis, Ind., 128 N. E. 831.

50. **Marriage**—Presumptively Valid.—There is a presumption of validity in favor of any marriage shown to have been solemnized, and the burden of proving its invalidity rests upon him who questions its validity, and this is true notwithstanding it requires proof of a negative.—Brotherhood of Railroad Trainmen v. Meredith, Ark., 225 S. W. 337.

51. **Master and Servant**—Constitutional Law.—If for any reason an employer sees fit to discharge an employe, he has such right, and it cannot be taken away from him.—Mechanics' Foundry & Machine Co. v. Lynch, Mass., 128 N. E. 877.

52.——Federal Employers' Act.—In view of Federal Employers' Liability Act, § 5, in an action against a railroad for death of its brakeman struck by a bridge on account of a defective telltale, instruction that public policy does not permit an employer by contract or application to relieve itself from liability for injuries occasioned by its negligence, etc., was proper, as it stated the law correctly.—Brant v. Chicago & A. Ry. Co., Ill., 128 N. E. 732.

53.——Partnership.—Where plaintiff entered the employ of defendant partner on terms of $25 a week salary and 10 per cent profits, in the absence of agreement on his part that a definite sum in the nature of salaries to partners should be deducted from profits, such deduction, in settling with him, was not justified; fixing the salaries of partners in a firm and paying them from profits being simply a division of profits.—Hoeland v. Lange, N. Y., 184 N. Y. Sup. 885.

54. **Monopolies**—Commodities Clause.—A contract between a coal company, which was only an instrumentality of a railroad company which owned all its stock, and a sales company, the stock ownership and management of which was the same as that of the railroad company, whereby the sales company purchased before transportation all the coal produced or purchased by the coal company at a percentage of the New York price and agreed to purchase coal from no one else, is void as violating Anti-Trust Act July 2, 1890, and the commodities clause of Act June 29, 1906, forbidding a carrier to transport commodities in which it had an interest.—United States v. Lehigh Valley R. Co., U. S. S. C., 41 Sup. Ct. 104.

55. **Mortgages**—Priority.—Where a mortgagee with knowledge of junior mortgages covering portions of the land released other portions from its mortgage, the junior mortgages are given priority to the extent of the value of the released land.—Turner v. Ridge Heights Land Co., N. J., 111 Atl. 675.

56. **Negligence**—Degree of.—Gross negligence is not a distinct cause of action, but a degree of negligence; negligence without reference to the degree being the basis of the right to recover.—Frederick v. Western Union Telegraph Co., Iowa, 179 N. W. 934.

57. **Patents**—Patentability.—A product which is the result of mechanical improvement only is not patentable, where the step in advance of that previously disclosed and open to public use is not only that which one skilled in the art might well make without the exercise of the originating or inventing faculty.—Berlin Mills Co. v. Procter & Gamble Co., U. S. S. C., 41 Sup. Ct. 75.

58. **Physicians and Surgeons**—Reasonable Care.—A physician is only bound to exercise such reasonable care and skill as is usually exercised by physicians in good standing in the profession.—Hayes v. Lufkin, Minn., 179 N. W. 1007.

59. **Principal and Agent**—Agency.—An agent to sell cannot purchase the property for himself unless he makes known to his principal that he is such purchaser and acquaints him with all facts, an inhibition which applies regardless of the agent's good faith, so that deed to an agent to sell from his principal is voidable by the latter.—Treat v. Schmidt, Col., 193 Pac. 666.

60. **Railroads**—Directors.—The fiduciary character of a terminal company, which held the property in trust for the railways using the terminal, extended to the officers and directors and to all others concerning the management of the terminal company, charging them with the duty to uphold the trust, and prohibiting them from reaping a personal advantage at the expense of the beneficiaries.—Chicago, M. & St. Ry. Co. v. Des Moines Union Ry. Co., U. S. S. C., 41 Sup. Ct. 81.

61.——Last Clear Chance.—The doctrine of last clear chance applies in a case where there was an appreciable time intervening between the collision between a railroad train and an automobile and the injury to the automobile driver, during which the railroad employees by the exercise of due care could have prevented the

injury.—Cleveland, C., C. & St. L. Ry. Co. v. Baker, Ind., 128 N. E. 837.

62. **Reformation of Instruments**—Mistake.—The mere fact that a mistake was made in an instrument does not show such negligence as to bar the right of reformation, though the term "mistake" carries with it the idea of fault.—City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co., Tex., 225 S. W. 391.

63. **Sales**—Implied Warranty.—Where defendant, a maker of motorcycles, desired a self-starter for its machines, and plaintiff, a manufacturer of self-starters for automobiles and motorboats, thereupon made a model, which, after alterations agreed upon, was approved by defendant after a test of some weeks, and a contract made for several hundred, there was no implied warranty, under Gen. Code Ohio, § 8395(1), of general fitness for the use intended, or beyond a warranty of suitable materials and proper workmanship.—Miami Cycle & Mfg. Co. v. National Carbon Co., U. S. C. C. A., 268 Fed. 46.

64.——Rescission.—Where a bank wrongfully rescinded the sale of secondhand material, reselling to another, held, that the buyer was entitled to recover the difference between the value of the machinery and the purchase price —Pipe & Contractors' Supply Co. v. First Nat. Bank of Litchfield, U. S. D. C., 268 Fed. 138.

65. **Salvage**—Participation in Award.—The master of a salving tug, who took from the salvaged vessel nautical instruments, books and papers, and a boat, which were retained until after answer was filed in a salvage suit, excluded from participation in the salvage award, and allowance for salvage of such articles denied.—The Copperfield, U. S. D. C., 268 Fed. 77.

66. **Schools and School Districts**—Vaccination.—A city, under its broad powers to enforce vaccination, may require vaccination of all school children for smallpox, even though there is no epidemic.—Zucht v. King, Tex., 225 S. W. 267.

67. **Specific Performance**—Mutual Mistake.—Where the language employed in a contract has been used under a mutual mistake as to its application, the minds of both parties having been misled by such mistake, so that they did not meet, such mutual mistake is sufficient to bar specific performance of the contract at the suit of either party.—Printz v. McLeod, Va., 104 S. E. 818.

68.——Option.—Time is of the essence of an option to purchase lands, and, if an agreement of such a nature was an option, in order to hold the sellers, payment on or before the date specified was a condition precedent to the buyer's right to relief by specific performance.—Morgan v. Forbes, Mass., 128 N. E. 792.

69.——Time of Essence.—Specific performance of a contract for the sale of land may be granted in a suit by the purchaser, though he failed to pay on the day stipulated, unless time is of the essence of the contract.—Flora v. Glover, Col., 193 Pac. 665.

70. **Street Railroads**—Last Clear Chance.—It is the duty of a street car motorman to use all means and instrumentalities at hand after he discovers, or should have discovered, the peril of an approaching automobile to stop his car and prevent a collision.—Bensing v. Waterloo, C. F. & N. Ry. Co., Iowa, 179 N. W. 835.

71. **Tenancy in Common**—Adverse Possession.—Adverse, open, notorious, continuous, and hostile possession for the statutory period by tenants in common gave them possessory title against co-tenants who had knowledge that the possession was of such character.—Strong v. Kentucky River Hardwood Co., Ky., 225 S. W. 358.

72. **Trade Marks and Trade Names**—Geographical Name.—When a geographical name is not used in a geographical sense, but in a fictitious sense merely to indicate ownership independent of location, as the name "Philadelphia Shoe Store" used by plaintiff doing business in California and seeking to enjoin defendants from using the same name, it may be a good trade-mark or trade-name.—Katschinski v. Keller, Cal., 193 Pac. 587.

73.——Good Faith.—The first user of a formula for medicine composed of common materials and which is not patented acquires no monopoly therein; but anyone acquiring knowledge of the formula without any breach of trust or good faith can reproduce it and market it, with the representation that it is the same as the original.—Eli Lilly & Co. v. William R. Warner & Co., U. S. D. C., 268 Fed. 156.

74.——Unfair Competition.—To warrant the granting of an injunction against unfair competition, it is not essential that the evidence should show that any particular person has actually been misled.—Willys-Overland Co. v. Akron-Overland Tire Co., U. S. D. C., 268 Fed. 151.

75. **Trespass**—Burden of Proof.—In trespass for cutting timber, the burden is on plaintiff to prove title or possession, if defendant had no title.—Williams v. Duston, N. H., 111 Atl. 690.

76. **Trover and Conversion**—Use and Dominion.—"Conversion" which will sustain trover must be a destruction of plaintiff's property or some unlawful interference with his use, enjoyment, or dominion over it.—Allen v. Jacob Dold Packing Co., Ala., 86 So. 525.

77. **Vendor and Purchaser**—Easement.—A general agreement to convey land free and clear of all incumbrances did not refer to an easement of way for an electric power and transmission line, consisting of wires carried upon steel piers 60 feet in height and 14 feet square at the base, resting upon solid and permanent foundations, one of which piers was known by the purchaser to be upon the land.—McCarty v. Wilson, Cal., 193 Pac. 578.

78.——Rescission.—When the purchaser seeks to rescind the contract for the sale of the property, the entire transaction in all its features must be rescinded.—Thiel v. Perkins, N. J., 111 Atl. 666.

79.——Subsequent Purchasers.—Representations by grantors as to restrictions on use of property, even though sufficient to estop grantors from afterward denying that the use of the property was not to be perpetually restricted as represented, would not bind subsequent purchasers without notice.—Dich v. Goldberger, Ill., 128 N. E. 723.

80.——Vendor's Lien.—A vendor's lien follows the property, and the vendor has a lien for the unpaid balance in the absence of waiver or abandonment; the burden of showing waiver or abandonment being on him who asserts it.—Monk v. Stuart, Ala., 86 So. 529.

81. **Waters and Water Courses**—Obstruction.—It was the duty of a railroad when it substituted a culvert for a trestle which carried its tracks over a stream to exercise due care not to obstruct the natural flow of the river; that is, it was its duty to secure against ordinary periodic freshets which could be foreseen with reasonable certainty.—Southern Ry. Co. v. White, Va., 104 S. E. 865.

82. **Wills**—Intention.—The testator's intention must be ascertained from the four corners of the will.—Carroll v. Herring, N. C., 104 S. E. 892.

83.——Lapsed Legacy.—Where the residuary clause gave the property to four legatees and provided that if any of such legatees should predecease testatrix the share of that legatee should lapse, the word "lapse" must be given its technical meaning, so that there was partial intestacy as to the share of a predeceased residuary legatee, especially where a previous clause of the will had contained the same provision relating to legacies to other relatives.—Hay v. Dole, Me., 111 Atl. 713.

84. **Witnesses**—Confidential Communication.—An attorney is not permitted to testify concerning any communication made to him by his client, in that relation, or his advice thereon, without the client's consent.—Wolverine Oil Co. v. Parks, Okla., 193 Pac. 625.

85.——Cross-Examination.—When testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness, tending to rebut that inference, is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right.—Larson v. Hafer, Neb., 179 N. W. 1013.